Engage PEO Client

New York Updates: State Paid Sick Leave; NYC Marijuana Pre-Employment Testing; Weekly Pay for Manual Workers; State COVID-19 Screening in the Workplace

The following is an overview of four employment law updates for New York:

New York State Paid Sick Leave; Marijuana Pre-Employment Testing in New York City;

Weekly Pay for New York Manual Workers; and State COVID-19 Workplace Screening

New York State Paid Sick Leave

On April 3, 2020, the NY Labor Law was amended and requires New York employers state-wide to provide a certain amount of paid or unpaid sick leave to be used for certain medical and employee safety-related reasons. **The paid sick leave requirements take effect – and covered employees will be entitled to begin accruing leave time – on September 30, 2020**. However, employees may be restricted from utilizing accrued sick leave until January 1, 2021.

Under the new sick leave provisions:

- employers with **4 or fewer employees and a net income of less than $1 million** in the prior tax year must provide employees with up to **40 hours** of unpaid sick leave;
- employers with between **5 and 99 employees** and employers with **4 or fewer employees and a net income of greater than $1 million** in the prior tax year must provide each employee with up to **40 hours** of paid sick leave per year;
- employers with **100 or more employees** will provide up to **56 hours** of paid sick leave per year.

Employees must accrue sick leave at a rate of at least **1 hour for every 30 hours worked**. Alternatively, employers may fulfill their obligation under the law by providing the full amount of sick leave in a lump sum at the beginning of each year (also referred to as front loading). Unused sick leave carries over to the following year, though employers with fewer than 100 employees may cap the use of sick leave at 40 hours per year and employers with 100 or more employees may cap the use of sick leave to 56 hours per year.

Employers may set a reasonable minimum daily increment for the use of sick leave of no greater than four (4) hours; and unused sick leave need not be paid out upon an employee's separation or termination of employment.

Covered reasons for taking sick leave under the law include:

- the need for **diagnosis, care, or treatment** of a **mental or physical illness** or preventative care of the employee or the employee's family member; and
- certain needs related to the employee or the employee's family member being the **victim of domestic violence, sexual offenses, stalking, or human trafficking**, including obtaining services

from a domestic violence shelter, rape crisis center, or other services program; participating in safety planning; temporarily or permanently relocating; meeting with an attorney or participating in legal proceedings; enrolling children in a new school; or taking other actions to increase the safety of the employee or employee's family members.

For purposes of this leave, a "**family member**" includes an employee's child (including foster child, legal ward, or equivalent legal relationship), spouse, domestic partner, parent (including a step- or foster parent, legal guardian, or equivalent legal relationship), sibling, grandchild, grandparent, and the child or parent of an employee's spouse or domestic partner.

Please download the policy addenda for distribution to your employees by September 30, 2020, which is the date the law goes into effect: Accrued NYS Sick Time Template; Front-loaded NYS Sick Time Template

This statewide law clearly states that it does not preempt or diminish existing city- or county-level paid sick leave laws. Furthermore, the new law does not give additional time off to employees on top of sick time already required by county and local jurisdictions. Employers already covered by the New York City Earned Safe and Sick Time Act (ESSTA) or the Westchester County paid sick leave law must continue to provide employees with leave that meets or exceeds the requirements of both the statewide and local laws.

Also, **employers need not provide additional time off if they already maintain a sick leave or other paid leave policy that provides employees with the same or greater amount of time off as required under the law** and which otherwise satisfies the law's accrual, carryover, and usage requirements.

Marijuana Pre-Employment Testing in New York City

Recently, the New York City Commission on Human Rights ("NYCCHR") **expanded the exceptions for the positions** that **marijuana testing** is allowed for as part of **pre-employment hiring in New York City**.

Earlier this year, NYC legislators passed a law banning employers in New York City from testing job applicants for marijuana and tetrahydrocannabinols, or THC – the active ingredient in marijuana. **Drug testing for marijuana as part of pre-employment hiring** is now considered an "**unlawful discriminatory practice**" by the New York City Commission on Human Rights ("NYCCHR").

However, on July 24, 2020, the NYCCHR expanded the **list of exceptions** that employers may require tests for job applicants applying for specific types of jobs. Testing is now permissible where:

- Required by the U.S. Department of Transportation or related state and local rules (e.g., flight crew and train dispatchers);
- Required by the federal government as a condition of receiving a contract or grant;
- Required by federal or state law "for purposes of safety or security;"

- A collective bargaining agreement includes terms related to pre-employment drug testing of job applicants; or
- **The position falls into one of these categories**:
  - Police officers
  - Peace officers
  - Law enforcement or investigative positions at the NYC Department of Investigation
  - Positions covered by New York City Building Code § 3321, which covers certain workers at building sites
  - Positions covered by New York Labor Law § 220-h, which covers certain workers at public work sites
  - Positions requiring a commercial driver's license
  - Positions supervising or caring for children
  - Positions supervising medical patients
  - Positions supervising vulnerable persons
  - Positions that regularly work on active construction sites
  - Positions that regularly operate heavy machinery
  - Positions that regularly work on or near power or gas lines
  - Positions that drive motor vehicles on most work shifts
  - Positions that fuel an aircraft, provide information regarding aircraft weight and balance, or maintain or operate aircraft support equipment
  - Positions where drug impairment would pose an immediate risk of death or serious physical harm to the employee or to other people

As a side note, it is important to mention that the **new law has not changed an employer's ability to drug test current employees for marijuana** nor does it limit employers' ability to ensure that their workplaces remain drug-free through policies, discipline, and other measures.

Reminder: Job postings and advertisements in NYC should not reference passing a drug test or background checks. These items should not be discussed until after a conditional job offer has been extended.

Weekly Pay for New York Manual Workers

New York courts recently issued a decision that affects frequency of pay for manual workers in the state. In *Vega v. CM & Assoc. Constr. Mgmt., LLC*, the court held that manual employees who are not paid weekly in accordance with the law could sue for liquidated damages. The court rejected the argument that employees who are paid full wages should not be entitled to liquidated damages because the overdue payments deny them of "the use of money" during the delay. Previously case law generally did not support damages in these types of cases. This decision could be very costly for employers who do not pay manual workers weekly.

A manual worker is defined by the NY Department of Labor as "a mechanic, workingman or laborer." It has been the long-standing interpretation of the NY Department of Labor that individuals who spend more than 25% of working time engaged in "physical labor" fit within the meaning of the term "manual worker."

Furthermore, the term "physical labor" has been interpreted broadly to include many different physical tasks performed by employees. (Reference: https://www.labor.ny.gov/legal/counsel/pdf/frequency-of-pay-frequently-asked-questions.pdf),

Clients are encouraged to speak with their HR Consultant and conduct an internal review for employees that may meet the definition of a manual worker. Many office-based businesses forget to consider maintenance staff.

Clients who decide to implement the change must also **provide each employee with a new Wage Theft Notice under the NY Wage Theft Prevention Act.** This notice must be **provided at least seven (7) days advance of a change in pay date or frequency of pay.** Therefore, the employer must provide a new Wage Theft Notice to each affected employee.

- **The Wage Theft Notices for hourly employees can be found here**;
- **Notices for other types of pay can be found here.**

If the employee's primary language is not English, regardless of whether the person is proficient in English, you will also **need to provide the notice in their primary language if NYS has made the form available**. The Department currently offers **translations** in the following languages: Spanish, Chinese, Haitian Creole, Korean, Polish and Russian which can be **found here**.

Once the employee signs the Wage Theft Notice provide them with a copy of the signed document and retain the original for six years.

COVID-19 Screening in the Workplace

As a reminder, per New York State Department of Health guidance, employers are directed to conduct mandatory daily health screening practices of their employees. Screening practices may be performed remotely (e.g. by telephone or electronic survey), before the employee reports to the office, to the extent possible; or may be performed on site. Screening also should be coordinated to prevent employees from intermingling in close contact with each other prior to completion of the screening.

At a minimum, screening should be required for all employees and completed using a questionnaire that determines whether the employee has:

- knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
- tested positive for COVID-19 in the past 14 days; and/or
- has experienced any symptoms of COVID-19 in the past 14 days.

A link to **Engage's screening form template can be found here.**

Please contact your Engage Human Resources Consultant if you have any questions.